Supreme Court, U.S.
FILED
MAR 01 2000
CLERK

No. 99-1241

IN THE

Supreme Court of the United States

THE CHILDREN'S HOSPITAL OF PHILADELPHIA, NAZARETH HOSPITAL and NORBERT FROESE, M.D.,

Petitioners,

v.

MICHAEL CUNNINGHAM, a minor, and MATTHEW CUNNINGHAM, a minor, by and through their parents, JAMES and MARY ANN CUNNINGHAM, and JAMES CUNNINGHAM and MARY ANN CUNNINGHAM, individually; STEPHEN P. and KAREN M. GAULT, as parents and natural guardians of STEPHEN R. GAULT, and STEPHEN P. GAULT and KAREN M. GAULT, individually; BRIAN PECK, a minor, by and through his parents, MARY and KEVIN PECK, and MARY PECK and KEVIN PECK, individually,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF COMMON PLEAS OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA

REPLY BRIEF FOR PETITIONERS

ALLAN H. STARR
Counsel of Record
KIM KOCHER
RONALD A. KRAUSS
WHITE AND WILLIAMS LLP
Attorneys for Petitioners
1800 One Liberty Place
Philadelphia, PA 19103
(215) 864-7000

158214

Counsel Press LLC
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

Table of Cited Authorities ii

I. The Trial Court's Order Satisfies the Finality Requirement of 28 U.S.C. § 1257 1

II. The Trial Court's Denial of Due Process Warrants a Grant of the Writ 3

A. The Trial Court's Denial of a Hearing Is a Fundamental Due Process Violation 4

B. Plaintiffs' Petition Rests on Factual Allegations Requiring a Hearing 4

III. Plaintiffs' Request for Sanctions Is Frivolous 7

TABLE OF CITED AUTHORITIES

Page

Cases:

Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) 1, 2, 3

Grovey v. Townsend, 295 U.S. 45 (1935) 3

Lewis v. Reid, 244 Pa. Super. 76, 366 A.2d 923, (1976), *aff'd on rearg.*, 244 Pa. Super. 599, 371 A.2d 872 (1976) 6

Mercantile National Bank v. Langdeau, 371 U.S. 555 (1962) 2, 3

Nanty-Glo v. American Surety Co., 309 Pa. 236, 163 A. 523 (1932) 5

Simpson v. Allstate Ins. Co., 350 Pa. Super. 239, 504 A.2d 335 (1986) 5

Virginia Railway Co. v. Mullens, 271 U.S. 220 (1926) 3

Statute:

28 U.S.C. § 1257 ..... 1, 3

I. The Trial Court's Order Satisfies the Finality Requirement of 28 U.S.C. § 1257

Plaintiffs acknowledge that this Court has held that certain state court decisions satisfy the finality requirement of 28 U.S.C. § 1257 even though there are further proceedings anticipated in the state court. *See* Resps.' Brief at 6-7. Plaintiffs, however, erroneously argue that this case does not fall within the finality requirement for such state court decisions as articulated in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

In *Cox*, the Court took a pragmatic view of the finality requirement and identified four categories of cases in which a state court's decision on a federal issue satisfies 28 U.S.C. § 1257 despite further state court proceedings. The fourth category involves:

> those situations where the federal issue has been finally decided in the state courts with further proceedings pending in which the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the nature and character of, or determining the admissibility of evidence in, the state proceedings still to come.

Id. at 482-83. In these cases "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and delayed justice. . . .' " *Cox*, 420 U.S. at 477-78.

In *Cox* itself, the Court reviewed a decision of the Supreme Court of Georgia upholding the constitutionality of a statute and remanding for trial on state law claims. The Court reasoned that "[the defendants] may prevail at trial on nonfederal grounds, it is true, but if the Georgia court erroneously upheld the statute, there should be no trial at all." *Id.* at 485.

Similarly in *Mercantile National Bank v. Langdeau*, 371 U.S. 555 (1962), the Court assumed jurisdiction over a case involving a federal venue statute despite the need for a subsequent trial in state court on the underlying state law claims. The Court reasoned that the federal question was a "separate and independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Id.* at 558. The Court further explained that:

> it serves the policy underlying the requirement of finality in 28 U.S.C. § 1257 to determine now in which state court appellants may be tried rather than to subject them, and appellee, to long and complex litigation which may all be for naught if consideration of the preliminary question of venue is postponed until the conclusion of the proceedings.

Id.

This case presents the same considerations that compelled this Court to accept jurisdiction over *Cox* and *Langdeau*. Here, the due process question is a "separate and independent matter, anterior to the merits" of the underlying medical malpractice actions. No other federal question will be decided in the medical malpractice actions. If Defendants prevail on the merits of the underlying actions, the Trial Court's denial of due process will not be subject to further review in the state courts. Moreover, if this Court reverses the Trial Court's order and requires fact-

finding proceedings, this litigation will end if Plaintiffs fail to meet their burden of proving a right to open the final un-appealed judgments: No trials in the underlying medical malpractice actions will be necessary. It thus serves the policy of the finality requirement to review Defendants' due process claims now rather than subject them to long and complex litigation that may prove to be unnecessary. It is the best way to avoid "the mischief of economic waste and delayed justice."

Further, the fact that the Trial Court, here, was the "highest court in which review could be had" does not affect the finality of the judgment under *Cox* and *Langdeau*. The "finality" and "highest court" requirements of 28 U.S.C. § 1257 are separate and distinct. As exemplified by *Grovey v. Townsend*, 295 U.S. 45 (1935), and *Virginia Railway Co. v. Mullens*, 271 U.S. 220 (1926), a state trial court may be the "highest court" for purposes of 28 U.S.C. § 1257 if the state appellate court denies discretionary review. Moreover, in *Cox*, the decision of the Supreme Court of Georgia, which this Court reviewed, was a discretionary appeal from an interlocutory order implicating First Amendment rights to freedom of speech. *See Cox*, 231 Ga. 60, 61, 200 S.E. 2d 127, 129 (1973). This Court's jurisdiction over an important federal question should not, as Plaintiffs suggest, be lost merely because the state's highest court has refused to exercise its discretion to review the Trial Court's order.

II. The Trial Court's Denial of Due Process Warrants a Grant of the Writ

Plaintiffs' Brief in Opposition raises tangential issues that skirt, and fail to refute, the fundamental procedural due process question raised by Defendants in their Petition for a Writ of Certiorari.

A. The Trial Court's Denial of a Hearing Is a Fundamental Due Process Violation

Plaintiffs' Brief mischaracterizes Defendants' due process claim as being "based solely on [the Trial Court's] denial of their discovery requests." Resps.' Brief at 23. Defendants' due process claim, though it includes the Trial Court's refusal to permit discovery, primarily challenges the Trial Court's refusal to permit *any* type of fact-finding proceeding prior to opening the final un-appealed judgments. The Trial Court's due process violation lies in its wholesale acceptance of the one-sided paper record presented by Plaintiffs' counsel without providing Defendants a hearing — with or without the opportunity for pre-hearing discovery — to test the verity of Plaintiffs' allegations.

B. Plaintiffs' Petition Rests on Factual Allegations Requiring a Hearing

Plaintiffs acknowledge that Mr. Smith's alleged mental breakdown was central to their Petition to Open and the Trial Court's decision to open the final un-appealed judgments. *See* Resps.' Brief at 21. The Trial Court accepted Plaintiff's theory of Mr. Smith's mental impairment based solely on the documentary evidence that Mr. Beasley presented: Mr. Beasley's affidavit, affidavits of Mr. Beasley's employees, a letter from a psychiatrist who allegedly examined Mr. Smith, copies of Mr. Smith's correspondence, and the docket reports from the underlying cases. *See* 7a-10a. Glaringly absent was any statement by Mr. Smith himself.

With only the self-serving documentary evidence presented by Mr. Beasley, Plaintiffs still maintain that Mr. Smith's purported breakdown is an undeniable fact not susceptible of refutation:

> [T]here really could be **no genuine dispute** that the underlying reason for the documented pattern of extreme dereliction and fraud in this matter lay in an impairment suffered by Mr. Smith. This was not only shown by the psychiatric evaluation of record, **but by common sense. It is simply obvious that** a lawyer with Mr. Smith's decades of experience **would have known that** . . . [his malpractice would lead to] the destruction of his career. **It is self-evident that** something in his mind **must have been** gravely amiss . . . .

Resps.' Brief at 20-21. (emphasis added).

Although Plaintiffs claim that it is "common sense" and "self-evident" that Mr. Smith suffered mental impairment, no fact-finder ever observed the demeanor of Mr. Beasley, his employees, the psychiatrist, or Mr. Smith. No defendant ever had the opportunity test the credibility of Mr. Beasley, his employees, the psychiatrist, or Mr. Smith through cross-examination. Without a credibility determination at a minimum, evidence like this, that is testimonial in nature, cannot support a fact finding under Pennsylvania law. *See Nanty-Glo v. American Surety Co.*, 309 Pa. 236, 163 A. 523 (1932) (self-serving affidavits do not establish the absence of a genuine issue of material fact).

Plaintiffs' additional claim that the Trial Court relied on simply the "pattern of professional dereliction" as reflected in the dockets — separate and distinct from Mr. Smith's mental state — rings hollow. The docket reports alone do not justify relief. Under Pennsylvania law, attorney mistake, oversight, or neglect, without more, does not constitute the extraordinary cause required to open final un-appealed judgments. *See, e.g., Simpson v. Allstate Ins. Co.*, 350 Pa. Super. 239, 504 A.2d 335 (1986) (en banc) (unexplained oversight of counsel does not justify opening final un-appealed judgment).

Without Mr. Beasley's affidavit to provide an explanation for Mr. Smith's inaction, the dockets alone do not support an inference of anything more than mere attorney mistake, oversight, or neglect, which does not justify relief. Indeed, in the three cases involved here, the dockets support the equally likely inference that Mr. Smith was simply *unable* to obtain favorable expert testimony and, therefore, had no choice but to suffer summary judgment.[1]

In the end, Plaintiffs' arguments appear to be designed solely to divert this Court's attention from the fundamental due process question at issue in this case: Did the Trial Court deprive Defendants of their rights to procedural due process by opening final un-appealed judgments, based on the self-serving paper record presented by Plaintiffs' counsel, without affording Defendants the opportunity to present evidence and cross-examine adverse witnesses? The absence of any testimony from Mr. Smith himself speaks volumes about the unfairness of the Trial Court's decision. When the Trial Court's decision to open final un-appealed judgments turned on questions of fact, the denial of fact-finding proceedings unconstitutionally deprived Defendants of all opportunity to protect their property rights. It is imperative for this Court to reaffirm the right to be heard in one's defense.

---

1. Plaintiffs further misleadingly argue that Defendants have failed to prove prejudice. It was, however, Plaintiffs' burden, as the petitioning party seeking to open final un-appealed judgments, to establish a lack of prejudice to Defendants. *See, e.g., Lewis v. Reid*, 244 Pa. Super. 76, 82-85, 366 A.2d 923, 926-27 (1976) (Majority and Concurring Opinions), *aff'd on rearg.*, 244 Pa. Super. 599, 371 A.2d 872 (1976). In any event, Defendants never had an opportunity to present evidence to establish prejudice due to the Trial Court's refusal to conduct an evidentiary hearing.

III. Plaintiffs' Request for Sanctions Is Frivolous

For the foregoing reasons, Defendants, in good faith, request a grant of a Writ of Certiorari to the Trial Court. Plaintiffs' intemperate arguments for sanctions are frivolous and do not warrant favorable consideration by this Court.

Respectfully submitted,

ALLAN H. STARR
Counsel of Record
KIM KOCHER
RONALD A. KRAUSS
WHITE AND WILLIAMS LLP
Attorneys for Petitioners
1800 One Liberty Place
Philadelphia, PA 19103
(215) 864-7000